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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 598

THE FOUNDING CHURCH OF SCIENTOLOGY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinions of the court of appeals (Pet. App. A1–A30) are reported at 409 F. 2d 1146. The clarifying opinion (Pet. App. A31–A34) issued in response to the government's petition for rehearing is reported at 409 F. 2d 1163.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1969. A petition for rehearing by the government was denied on April 18, 1969, and a clarifying opinion was issued on that date. Mr. Justice

Black timely extended the time for filing a petition for a writ of certiorari to September 15, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly ruled that at a new trial seeking condemnation of devices which petitioners (The Founding Church of Scientology and individual adherents) have marketed as an aid in curing various diseases (1) the government may challenge the *bona fides* of petitioners' claim that Scientology is a religion and (2), apart from the question of the religious nature of the Scientology movement, the government may introduce, as evidence of false labeling, writings that rest entirely on secular, and not on religious, claims.

STATEMENT

On June 28, 1967, after a jury trial in the United States District Court for the District of Columbia, a decree of condemnation was entered, ordering the destruction of a misbranded device intended for use in the diagnosis, prevention, treatment, mitigation, or cure of disease within the meaning of the Federal Food, Drug, and Cosmetic Act. The device, known as a "Hubbard Electrometer" or "E-meter," was found to be misbranded under 21 U.S.C. 352(a) in that its labeling contained false and misleading statements and under 21 U.S.C. 352(f)(1) in that its labeling

failed to bear adequate directions for use.[1] Various literature, held to be "labeling" within the meaning of the Act, was also ordered condemned.

The evidence upon which the verdict was based may be summarized as follows:

The Scientology movement rests almost entirely upon the writings of L. Ron Hubbard. In the early 1950's, Hubbard espoused a theory which he termed "Dianetics" (Pet. App. A7). Its postulate is that man possesses both a reactive and an analytic mind. The analytic mind is a superior computer, incapable of error, to which can be attributed none of the human misjudgments which create social problems and much individual suffering (*ibid.*). Imperfections are traceable to the reactive mind which is made up of "engrams" or patterns imprinted on the nervous system in moments of pain, stress, and unconsciousness (*ibid*). All mental and psychosomatic disorders are caused by engrams (Pet. App. A8).

The literature of Dianetics termed the ordinary person, encumbered by the engrams of the reactive mind, as a "pre-clear."[2] The goal was to make persons "clear." A "clear" person was one who could be tested for any and all psychoses, neuroses, psychoso-

[1] 21 U.S.C. 352 provides in relevant part: "A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular * * * (f) Unless its labeling bears (1) adequate directions for use * * *."

[2] The term is an analogy to a computer from which previously programmed instructions have not been erased.

matic ills, etc., and be found free of all such ills and whose intelligence is high above the current norm. See *Dianetics: The Modern Science of Mental Health* (Govt. Ex. 26, p. 8). The process by which one becomes "clear" is known as "auditing"; this involves a conversation with an "auditor" who would discover and expose "engrams" (Pet. App. A8). Auditing is performed by use of the E-meter, a crude skin galvanometer similar to those used in giving lie detector tests. The subject holds in his hands two soup cans which are linked to the electrical apparatus. A needle on the apparatus registers changes in the electrical resistance of the subject's skin (Pet. App. A10). The trained auditor can allegedly use this to diagnose the mental and spiritual condition of the subject.

Hubbard asserted in the literature that arthritis, dermatitis, asthma, some coronary difficulties, eye trouble, bursitis, ulcers, and sinusitis are psychosomatic and can be cured by auditing (Pet. App. A8); in addition the literature claimed that tuberculosis is "perpetuated by engrams" and that cancer may be treated by auditing (*ibid.*).

A few years after Hubbard developed the theory of Dianetics, he began to set forth the broader theory of Scientology. Scientology expressly encompasses Dianetics (*ibid.*). With Scientology came the claim that the movement is a religion. Hubbard thus asserted kinship with theories espoused by Eastern religions, especially Hinduism and Buddhism (Pet. App. A9). He argues that man is essentially a free and immortal spirit (a "thetan" in Scientological terminol-

ogy), and that this spirit inhabits the "mest body" ("mest" is an acronym of the words matter, energy, space, time). Man is said to be characterized by the qualities of "beingness," "havingness," and "doingness." The world is constructed on the relationships of "Affinity," "Reality," and "Communication," which taken together are denominated "the ARC Triangle" (*ibid.*).

Hubbard's followers in the United States began to organize formal religious bodies. (The Founding Church of Scientology of Washington, one of the petitioners here, was incorporated in 1955.) The move toward formal religious organization, however, disturbed some adherents who regarded it as an attempt to provide a legal cloak for the movement's activities (Pet. App. A9). Hubbard defended the religious nature of the movement in various periodicals. For example, *Ability* (a Scientologist magazine), Issue 14, Govt. Ex. 9L, p. 14, stated:

> Scientology is going all out as a religion. The religious aspect is highly functional, very true, and is very much more successful * * *. The public expects to have ministers around. That's us, folks.
>
> * * * * *
>
> * * * If you don't like religion for heaven's sakes call yourself a Dianeticist.[3]

[3] In "L. Ron Hubbard's *PAB's Book V*," Govt. Ex. 20, p. 79, a Canadian Scientologist explains that "in the U.S.A. Ron has tried the religious approach with good success. If we can 'get it across' on this basis, is there really anything so shocking about it?"

The literature further represents Scientology as a "precise and exact science, designed for an age of exact sciences" (*Scientology, The Fundamentals of Thought,* Govt. Ex. 31, p. 9). The claim is made that "there are no tenets in Scientology which cannot be demonstrated with entirely scientific procedures (*id.* at 41).[4] *E-meter Essentials,* Govt. Ex. 7, pp. 6, 7, 18, states:

> The meter will also read Basal Metabolism * * *.
>
> * * * * *
>
> The Hubbard Electrometer is an electronic device for measuring the mental state and change of state of Homo Sapiens.
>
> * * * * *
>
> The person who says the meter is not a precision instrument is either unfamiliar with one or has something to hide. The auditors questions can be off. The meter never is.

Scientologist literature also sets forth promotional plans: Hubbard's *PAB's Book* 5 at pp. 36–38 advises that the "minister" should not solve the problem of the individual responding to an advertisement, but should make something of it so that paying "clientele" can be obtained.

At the trial the government introduced expert medical testimony to show that the E-meter was of no value in the diagnosis, treatment or cure of any disease of man (Tr. 979, 980, 1080–1081; J.A. 172–173, 183–184).

The jury returned a general verdict "for the Gov-

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[4] See, also, *Scientology, The Evolution of a Science,* Govt. Ex. 37; *What is Scientology,* Govt. Ex. 16, pp. 1–4.

ernment" (Pet. App. A2) and a decree of condemnation was entered.

2. In a detailed opinion, one judge dissenting, the court of appeals reversed. In essence, the majority concluded that since some of the vast amount of literature submitted to the jury to support the false labeling claim was *prima facie* religious doctrine,[5] the jury's verdict might have been based on religious material. Since such an application of the Act would present grave constitutional problems under the Free Exercise Clause of the First Amendment, the court "interpret[ed] the Act as not including within its concept of 'labeling' the literature developing the doctrines of a religion" (Pet. App. A22–A23).

In response to the government's petition for rehearing, the court issued an opinion containing "clarifying observations" (Pet. App. A31–A34). After pointing out that a new trial "would appear" to be "in order" (Pet. App. A33), the court stated that at such trial "it is incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling makes religious claims and hence cannot be submitted to the jury for the factual determination of whether it is a label for the device in question and whether it is false"; wholly secular material could be submitted to the jury (Pet. App. A33–A34). The court further noted that, in the event of a new trial, it was open to the government to challenge the *bona*

[5] Neither at the trial nor on appeal did the government challenge petitioners' claim that Scientology was a religious movement, and the court below concluded that petitioners had "made a *prima facie* case for such status" (see Pet. App. A24).

fides of the claim that Scientology is in fact a religion (Pet. App. A34).

ARGUMENT

The court below in its original and clarifying opinions sought to accommodate the constitutional guarantee of free exercise and practice of religion with the congressionally recognized needs of the community to be protected from fraudulent health claims. It held that the trial had not provided sufficient safeguards for religious freedom, and its opinions set forth guide lines for the accommodation of both interests at a new trial. There is no reason for review of that decision by this Court in the present posture of this case.

No decision of this Court forecloses the government from showing—if it can—that what purports to be a religion is in truth a commercial enterprise cloaking secular activities in pretended religious garb. Nor does the ruling below improperly inhibit a true religious movement by permitting the government to show that certain literature of such a movement, "wholly nonreligious" in nature, is being used to make fraudulent health claims to the public—or that devices are being sold by it to the general public for use by them in the treatment of disease without labeling which bears adequate directions for the intended use. While, as the court below recognized, *United States* v. *Ballard*, 322 U.S. 78, makes "suspect the legal inquisition" of doctrines held as religious tenets (Pet. App. A22), that

case did not foreclose inquiry into commercial promotion that is non-religious in nature.

In *Ballard*, the claim was made that religion would heal. The protection of the free exercise clause does not, however, extend to representations which purport to have a scientific or medical basis rather than one founded on religion. See *People* v. *Vogelgesang*, 221 N.Y. 290, 293; Weiss, *Privilege, Posture and Protection—"Religion" in the Law*, 73 Yale L.J. 593. Where the claims are clearly scientific in nature, to permit an attendant religious "overlay" to defeat the public interest would be to ignore that the "problem is a practical one of consumer protection not dialectics". *United States* v. *Urbuteit*, 335 U.S. 355, 358.

Petitioners' reference to the ceremonies and scriptures of other religions are inapposite. As we have noted, the approach required by the court below at a new trial would not impose any restrictions on the free exercise or practice of religion (including faith healing); it would narrowly prohibit the use of secular misrepresentations to defraud the consumer.[6]

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[6] Petitioners' reliance on *People* v. *Woody*, 40 Cal. Rptr. 69, 394 P. 2d 813; and *In re Jenison*, 267 Minn 136, 125 N.W. 2d 588, is misplaced. Neither case foreclosed the government from challenging the good faith of a person's purportedly religious beliefs. Moreover, both decisions recognized that even if religious beliefs are in fact held in good faith, the government is still free to show a compelling state need for regulation.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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